IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.786 OF 2005

Floyd D. Aguiar ...Petitioner

Vs.

Bronwyn D. Aguiar & Anr. ...Respondents

Shri Subhash Jha with Shri Ghanshyam Upadhyay for the Petitioner.

Shri V.M. Bharadwaj for the Respondent No.1.

Shri S.R.Shinde, A.P.P. for the State.

CORAM : ABHAY S. OKA, J.

DATE : AUGUST 31, 2006.

JUDGMENT:

1. Heard Shri Jha, the learned Counsel appearing for the Petitioner. This Petition is filed under Article 227 of the Constitution of India read with section 482 of the Code of Criminal Procedure, 1973. The challenge in this Petition is to an order passed by the learned Additional Chief Metropolitan Magistrate, Mumbai by which he issued process on a private complaint filed by the first Respondent alleging commission of offences punishable under sections 500 and 501 of the Indian Penal Code. The Petitioner is arraigned as an accused in the said complaint. In this Petition, the Petitioner has also taken exception to order dated 24th February, 2004

passed by the learned Magistrate by which Application made by the Petitioner for recalling order issuing process has been rejected. The Petitioner has disclosed in the Petition that a Revision Application has been filed in the Sessions Court by the Petitioner for challenging the said order dated 24th February, 2004. It is stated in the Petition that the said Revision Application may not survive in the light of the decision of the Apex Court in the case of **Adalat Prasad Vs. Rooplal Jindal & Ors. (2004 Supreme Court Cases(Cri.) Page 1927).**

2. The question is whether this Petition can be entertained when remedy available to the Petitioner to prefer a Revision Application under section 397 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code) has not been exhausted by the Petitioner. This issue arises in view of decision of the learned single Judge of this court in the case of **V.K.Jain and Ors. Vs. Pratap V. Padode and Anr. (2005(3) Maharashtra Law Journal Page 778).**

3. Shri Jha, the learned Counsel appearing for the Petitioner did not dispute that order passed by the learned Magistrate of issuing process can be challenged by the Petitioner by filing a Revision

Application under section 397 of the said Code and that the Petitioner has not filed such a revision Application. He submitted that the remedy available under section 482 of the said Code is much wider than the remedy available under section 397 of the said Code. He submitted that the scope of powers of this Court under section 482 of the said Code is completely different from the powers of the Sessions Court in Revisional Jurisdiction under section 397 of the said Code. He submitted that if the Petitioner files a Revision Application before the Sessions Court and if he does not succeed in the said Revision Application, bar under sub-section 3 of section 397 of the said Code will come in the way of the Petitioner in approaching this court by way of filing a Petition for invoking the powers under section 482 of the said Code. He has placed reliance on several decisions, a reference to which is made in the later part of this order.

4. I have carefully considered the submissions. In the present case, the Petitioner filed an Application before the learned Magistrate praying for recalling the order by which process was issued on the private complaint filed by the first Respondent. The

said Application was rejected. In view of the law laid down by the Apex Court in the case of Adalat Prasad(supra) the said Application made by the Petitioner was not maintainable. Therefore, the Petitioner has rightly contended that the Revision Application filed by him before the Sessions Court for challenging the order on the said Application will not survive. As held by the Apex Court, the Application for recalling the order issuing process was not maintainable. Therefore, there is no merit in this Petition in so far as the challenge to the order dated 24th February, 2004 is concerned.

5. In the case of V.K.Jain (supra) a contention was raised before the learned single Judge of this Court that in view of decision of the Apex Court in the case of Adalat Prasad (supra) as well as in the case of **Subramanium Sethuraman Vs. The State of Maharashtra and Anr. (2005(1) Maharashtra Law Journal Page 626)** a Revision Application under section 397 of the said Code is not maintainable against an order issuing process on a private complaint. After considering the aforesaid decisions of the Apex Court, the learned single Judge held that an order issuing process is not an interlocutory order and hence, a Revision Application against the said order is

maintainable. The learned single Judge in paragraph No.26 of the said decision held thus:

> "26. **If one bears in mind the principle laid down in the case of Madhu Limaye in relation to the exercise of power of the High Court under section 482 of Criminal Procedure Code, it is clear such power should not be resorted to if there is specific provision in the Code for the redress of the grievance of the aggrieved party. As observed earlier, the applicants have an efficacious remedy of preferring revision in respect of the order of the Magistrate issuing process**. Thus, as there is a specific provision in the Code for redressal of the grievance of the applicants, in my opinion, it would be appropriate that the applicants prefer a revision against the order of the Magistrate issuing process. This is the position in respect of the application under Section 482 of Criminal Procedure Code. As far as Writ Petitions seeking similar reliefs i.e. quashing of process or proceedings in which process has been issued, are concerned, it would be advantageous to refer to a decision by five Honourable Judges

> of the Supreme Court in the case of Thansingh Nathmal Vs. The Supdt. of Taxes Dubri and Ors. reported in MANU/SC/0255/1964., AIR 1964 SC 1419, [1964]6 SCR654, [1964]15 STC468 (SC). In the said decision, it has been observed that when there is an efficacious alternate remedy, a Writ Petition ought not to be entertained."(Emphasis supplied)

In paragraph No.27 the learned single Judge held thus:

> "27. Thus as in my opinion, when, the applicants have an efficacious remedy of preferring revision before the Sessions Court against the order issuing process they should not be deprived of the same. Hence, in view of the discussion in the foregoing paras, in my opinion, it would be appropriate that the applicants prefer a revision before the concerned Sessions Court against the order issuing process against them."

6. The Apex Court in the case of **The State Vs. Navjot Sandhu & Ors. (2002) 6 Supreme Court Cases Page 641)** held that (a) the inherent jurisdiction of the High Court under section 482 of the said Code can

be exercised even when there is a bar under section 397 or under some other provisions of the said Code in view of non obstante clause used in section 482; (b) however, this power cannot be exercised if there is a statutory bar in some other enactment; (c) if the order assailed could be corrected in exercise of revisional powers or appellate powers, the High Court must refuse to exercise its inherent power; (d) the inherent power is to be used only in cases where there is an abuse of process of the court or where interference is absolutely necessary for securing the ends of justice; (e) the inherent power must be exercised very sparingly. The inherent power is not to be resorted to if there is a specific provision in the Code or any other enactment for redressal of grievance of the aggrieved party.

7. Thus, the law laid down by the Apex Court in the case of Navjot (supra) makes it very clear that power under section 482 can be exercised even when there is bar under section 397 of the Code. Thus, the submission of Shri Jha that if Revision Application is decided against the Petitioner it will not be open for the Petitioner to approach this Court for invoking the powers under section 482 of the said Code is not correct. The learned single Judge of this court in

the case of **Ashok Yashwant Samant Vs. Suparana Ashok Samant (1990 Maharashtra Law Journal Page 963)** held that High Court can exercise its powers under Article 227 of the Constitution of India as well as under section 482 of the said Code even after aggrieved party has exhausted the remedy of filing Revision Application under section 397 of the said Code. However, the Apex Court has held that the inherent power is not to be resorted if there is a specific provision in the Code for redressal of the grievance of the aggrieved party.

8. So far as power under Article 227 of the Constitution of India is concerned, it is true that it is very wide. The power can be used to meet the ends of justice. The said power can be exercised to interfere even with an interlocutory order. However, the jurisdiction under Article 227 of this court is discretionary. The power under Article 227 being a power of judicial superintendence has to be exercised sparingly and only to keep sub-ordinate courts within the bounds of their authority. It cannot be said that availability of remedy of revision before the Sessions Court takes away the jurisdiction of the High Court to exercise powers under Article 227 of the Constitution of India. However, as a normal rule, jurisdiction

under Article 227 of the Constitution of India will not be exercised if another statutory remedy is available as the power of superintendence cannot be used to circumvent express provisions of a Statue. Therefore, this court will not normally exercise jurisdiction under Article 227 when the aggrieved party has not exhausted a statutory remedy.

9. The submission of Shri Jha is that when it is demonstrated that there is a gross abuse of process of law the High Court can exercise power under section 482 of the said Code even though remedy under section 397 is not availed of. He submitted that while deciding revision against an order issuing process the court exercising the power of revision cannot look into any material which is not produced alongwith the complaint. Relying on decision of the learned single Judge of this court in the case of **Shriram D. Mulay and Anr. Vs. Thakurdas Sharma (Criminal Application No.46 of 1977 decided on 20/21 April, 1977)** he submitted that power of this court under section 482 is not controlled by section 397 of the said Code. He invited my attention to the decision of the Apex Court in the case of **Netai Dutta Vs. State of West Bengal ((2005) 2 Supreme Court Cases Page 659)** and submitted that when prosecution initiated was likely to result

only in shear harassment to the accused without any fruitful result, the power under section 482 of the said Code can always be exercised.

10. Shri Jha also placed reliance on a decision of the Apex Court in the case of **Union of India & Anr. Vs. Major Bahadur Singh (2005 AIR SCW Page 6113)** and submitted that the decision of the Apex Court in the case of Madhu Limaye (AIR 1978 S.C. Page 6113) cannot be read either as Euclid's theorems or as a statute. He submitted that decision in the case of Madhu Limaye (supra) cannot be read to mean that jurisdiction of the High Court is ousted when remedy of revision under section 397 is available.

11. The Apex Court has time and again held that the inherent jurisdiction though wide has to be exercised very sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in section 482. In the present case when the Petitioner can avail of remedy of filing a Revision Application before the Sessions Court for challenging the order issuing process, the jurisdiction under section 482 which is to be exercised sparingly cannot be invoked. Even if the Petitioner fails in Revision Application, his remedy

of approaching this court is not taken away provided the case is covered by tests specifically laid down in section 482 of the said Code. As stated earlier, the jurisdiction under section 482 of the said Code is to be exercised sparingly. In view of the law laid down by the Apex Court and in particular in the case of Navjot Sandhu (supra), I am not inclined to entertain this Petition.

12. Shri Jha, the learned Counsel appearing for the Petitioner submitted that as this Petition was pending in this Court for considerably long time, the Petitioner will be faced with hurdle of bar of limitation if a Revision Application is to be filed in the Sessions Court. I find that this Petition was filed by the Petitioner in this Court on 15th March, 2005 and on 21st March, 2005, this Court issued notice before admission to the Respondents. If Petitioner approaches the Sessions Court by way of a Revision Application, while considering the prayer for condonation of delay, the Sessions Court is bound to take into account the fact that the Petitioner filed this Petition in this court on 15th March, 2005. The Sessions Court will also consider the fact that this court issued notice on the Petition and the same remained pending till today.

13. Hence, the Writ Petition is rejected. Rejection of the Writ Petition will not prevent the Petitioner from adopting remedy of filing Revision Application before the Sessions Court. All contentions of the parties on merits of the pending complaint are kept open.

JUDGE